OCT 1 1968

JOHN F. DAVIS, CLERK

No. 629

IN THE

Supreme Court of the United States

OCTOBER, TERM, 1968

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IN THE MATTER OF THE
SUCCESSION OF
E. W. K. ANDRAU

PETITION BY BANK OF THE SOUTHWEST NATIONAL ASSOCIATION, HOUSTON, FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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October 8, 1968

FIDELITY PRINTING COMPANY, INC., HOUSTON

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• • •

May It Please the Court:

Petitioner, Bank of the Southwest National Association, Houston, prays that a writ of certiorari issue to the Supreme Court of the State of Louisiana to review its judgment entered July 16, 1968, on application for writs of certiorari and mandamus to review orders of the District Court of Pointe Coupee Parish and of the Court of Appeal, First Circuit, which orders denied Petitioner its venue right as a national bank to be sued only in the district, county and state in which it is located. United States Code, Title 12, Section 94.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Louisiana is printed in Appendix A, infra. The judgment and opinion of the Court of Appeal, First Circuit, State

of Louisiana, is printed in Appendix B, infra. The judgment and opinion of the Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, is printed in Appendix C, infra. None of the opinions below was officially reported.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on July 16, 1968. (A, S 165).* The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), as interpreted by *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963).

QUESTIONS PRESENTED

A. Does a national bank located in Texas and which has never appointed a local agent for service in Louisiana, waive the protection of the National Bank Venue Act, Title 12, United States Code, Section 94, providing that a national bank must be sued at the place where it is located, by becoming ancillary executor of the Louisiana estate of a Texas decedent and thereafter filing an inventory of the estate, state inheritance tax returns in Louisiana and administering the Louisiana properties of such Texas resident's estate?

B. Is a "proceeding" seeking a personal judgment against a Texas national bank which is brought in the same style and number as the action in which the bank voluntarily appeared to be appointed ancillary execu-

* References to "(S)" and to "(D)" are to pages of the record in the Supreme Court of the State of Louisiana and of the record in the Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, respectively, as certified by the Clerks of those Courts. References to "(A)", "(B)" and "(C)" are to the Appendix.

tor in Louisiana for a Texas decedent an "action or proceeding" within the meaning of United States Code, Title 12, Section 94, entitling the Bank to its venue privilege?

C. Is such a personal action against a Texas national bank in Louisiana which is brought as part of a Louisiana Probate proceeding a "local action" within *Casey* v. *Adams*, 102 U.S. 66 (1880) and, if so, an exception to the exclusive venue rights of a national bank under United States Code, Title 12, Section 94?

STATUTE INVOLVED

The statute in issue in this case is 12 U.S.C. § 94, which provides:

> "Actions and *proceedings* against any association under this chapter may be had in any district or territorial court of the United States held within the district *in which such association may be established*, or in any state, county or municipal court *in the county or city in which said association is located* having jurisdiction in similar cases."*

STATEMENT OF THE CASE

1. The Parties.

Petitioner, Bank of the Southwest National Association, Houston ("the Bank") is a national banking corporation duly incorporated and authorized to transact business as a national bank under the Acts of Congress. Under its charter it is established and located in Houston, Harris County, Texas. (D 387). In 1951, Dr. E. W. K. Andrau, while domiciled in Texas, died testate leaving a wife and three children. Dr. Andrau left his share of community

*Emphasis ours throughout, unless otherwise noted.

property and all of his separate property in trust for his three children, who are also residents of Texas. By his will, Dr. Andrau named the Bank (then Second National Bank of Houston) independent executor of his estate and also testamentary trustee of the testamentary trusts for his children. (D 8, 19).

The Bank in 1951 opened a probate proceeding in regard to the estate of Dr. Andrau in Harris County, Texas, and qualified as independent executor. (D 2, 3). Later, in 1952, it opened an ancillary succession (probate) proceeding in Pointe Coupee Parish, Louisiana, and was appointed Louisiana executor of the Succession of E. W. K. Andrau in June, 1952. (D 26, 27). Petitioner, however, never appointed an agent for service of process in connection with the ancillary succession proceeding in Louisiana and has never qualified to do business in Louisiana. (D 374, 375).

Respondents are the three children of Dr. E. W. K. Andrau, Mrs. Helen Antoinette Andrau Seigler, William E. Andrau, and Mrs. Barbara Andrau Peck, all residents of Texas.

2. The Actions.

On February 27, 1968, an action was filed in the Texas District Court in Houston, Harris County, Texas (where the Bank is located) by the three Andrau heirs, seeking judgment against the Bank for alleged exeessive fees and alleged mismanagement of the Andrau estate. (D 435).

On February 28, 1968, the following day, Mrs. Helene Antoinette Andrau Siegler, William E. Andrau and Mrs. Barbara Andrau Peck (the three Andrau children) filed an action in Louisiana to recover penalties in the sum of millions of dollars from the Bank. (D 300, 306). This action was denominated a "Motion for Rule to Show Cause" and was filed in the same style and number on the docket

of the Eighteenth Judicial Court, Parish of Pointe Coupee, State of Louisiana, as the original succession proceeding. Service of citation on the Bank was made upon the Louisiana attorney who had last appeared for the Bank in the succession. (D 327). Among other things, such new proceeding complained of the Bank's alleged mismanagement of the Andrau estate by failing to file accountings in the Louisiana succession proceeding and failure to deposit funds of the succession estate in banks in Pointe Coupee Parish rather than with itself in Houston, Texas.

The Bank appeared and answered the Texas suit and has filed a cross-action therein.

The Bank also appeared in the Louisiana proceedings *solely for the purpose of contesting venue* and filed its Declinatory Exception: Lack of Jurisdiction of Presence of Defendant, the proper procedure for attacking venue in Louisiana. (D 357, S 23). The basis for its venue attack was that it is a national bank and that under a federal statute, 12 U.S.C. § 94, as interpreted by the United States Supreme Court, actions and proceedings against it must be brought in the district, county and state in which it is established, which is only in Houston, Harris County, Texas.

3. The Orders in Question.

The Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, on May 27, 1968, entered an order overruling the declinatory exception. (D 359, S 13, C).

The Bank thereafter filed with the Court of Appeal, First Circuit, State of Louisiana, pursuant to Article 7, § 29 of the Constitution of Louisiana, as amended in 1958, a petition for writ of certiorari and mandamus for the Court of Appeal to direct the trial court to sustain its declinatory

exception, this being proper procedure under Louisiana law for review of the trial court's ruling, since Louisiana law does not provide for direct appeal from venue rulings. The Court of Appeal by order dated June 20, 1968, refused the writs sought by the Bank with the notation that the ruling of the trial court was correct. (S 77, B).

The Bank then filed with the Supreme Court, State of Louisiana, pursuant to Article 7, § 29, of the Constitution of Louisiana, as amended in 1958, and Rule 12 of the Louisiana Supreme Court Rules, a petition for writ of certiorari and mandamus for the Supreme Court of Louisiana to direct the trial court to sustain the declinatory exception filed by petitioner. (S 2). That Court, by order dated July 16, 1968, also refused the writs sought by the Bank, again with the holding that the ruling of the trial court was correct. (S 165, A).

The Bank now files this petition for writ of certiorari, to review the Louisiana Supreme Court's venue ruling, under *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963), in which the Supreme Court clearly held that "final judgments or decrees" for Supreme Court review under 28 U.S.C. § 1257 included venue rulings of a state court since they are *"a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action."* (371 U.S. 555, at page 558).

REASONS WHY THE WRIT SHOULD BE GRANTED

Decisions with respect to venue of national banks have frequently been reviewed by this Honorable Court, and the opinions of the Supreme Court show that the venue privilege of national banks has been jealously guarded by this Court. The decision of the Louisiana Supreme Court in this case raises important and far-reaching questions con-

cerning (i) whether conduct of a national bank *prior to suit* can waive the statutory privilege; (ii) if so, does acting as executor and trustee in another state constitute waiver; (iii) the proper construction of 12 U.S.C. § 94 as applying not only to "actions" *but to proceedings* in an already pending action and (iv) whether "tieing" a state court proceeding seeking damages and penalties to an existing probate action makes the entire suit "local" in character and thus an exception to the federal venue privilege.

1.

The lower federal courts and some state courts have heretofore held that a national bank's pre-suit conduct may constitute a waiver (e.g., *Buffum* v. *Chase Nat'l Bank*, 192 F2d 58 (7th Cir. 1951); *Litchenfels* v. *North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963)); the United States Supreme Court has never gone so far, holding only that a failure to raise the venue privilege until after a trial on the merits constitutes waiver. *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141 (1889). As the Supreme Court there held:

> ". . . But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, *if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late.*"

The present case furthermore presents squarely the question left open in *Michigan Nat'l Bank* v. *Robertson*,

372 U.S. 591 (1963), (Whether a national bank's pre-suit conduct can waive its venue privilege). In *Robertson*, this Honorable Court remanded the case to the Nebraska Supreme Court for that Court to consider, in the first instance, that question. Since on remand the Nebraska Supreme Court held that the Bank's pre-suit conduct did *not* constitute a waiver of the venue privilege (*Hills* v. *Burnett*, 175 Neb. 871, 125 N.W.2d 66 (1963)), the question of pre-suit conduct as waiver did not again reach the Supreme Court in the *Robertson* case.

The same question of whether pre-suit conduct of a national bank can constitute a waiver of its venue privilege was also not answered by this Court in *Bank of America* v. *Whitney Central Nat'l Bank*, 261 U.S. 171 (1923), decided subsequently to *Morgan*, where the Court observed:

> "Whether a national bank could *under any circumstances*, be subjected, without its consent, to suit in a state or district, other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

That this question (pre-suit conduct as waiver) should now be squarely answered is shown by *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963), where this Court (just a few months prior to *Robertson*) stated:

> "Congress consented to have national banks subject to suit *and we believe Congress intended that in those courts alone* [*those provided by the federal national bank venue statute*] *could a national bank be sued against its will.*"

That a waiver of venue requires *actual consent* and not implied consent from activity in the forum state should perhaps follow from this Court's opinions in *Olberding* v. *Illinois Central Railroad Co.*, 346 U.S. 338 (1953), and *Neirbo* v. *Bethlehem Ship Building Corp.*, 308 U.S. 166 (1939).

In any event because of the uncertainty of the correct interpretation of the *Robertson* case, and because of the clear conflict between the language in the *Morgan* case that only if the venue privilege *is not claimed* (after suit is filed) does a waiver occur and the holdings of lower courts that waiver may occur by pre-suit activity, writ of certiorari should be granted in order finally to put at rest the doubtful state of the law on this question.

This Court and the Federal Courts of Appeal have clearly held that the Congressional privilege granted banks under 12 U.S.C. § 94 is an important and valuable right to be given a mandatory and not a permissive interpretation and one which cannot be superseded by contrary state venue provisions, *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963), or even by special venue provisions of the Federal Securities Acts, *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.,* 394 F.2d 300 (2nd Cir. 1968). Moreover, national banks are quasi — public institutions, national in character, subject to the control of Congress and are not to be interfered with by *state* legislative or *judicial action* except so far as the lawmaking power of the United States Government may permit. *Mercantile Nat'l Bank* v. *Langdeau,* supra. In fact, because of their national, quasi — public character, this Court has recently held that national banks are immune from state taxation in certain areas. *First Agricultural Nat'l Bank* v. *State Tax Commission,* ..... U.S. ....., 20 L.Ed.2d 1138. (June 17, 1968).

Therefore, because of the express legislative and judicial policy of carefully protecting federally granted rights to national banks, it is important that this Court resolve the question of pre-suit waiver of venue rights by a national bank where the bank has timely claimed its venue privilege. This is particularly important because the rights

and privileges provided by 12 U.S.C. § 94 may subsist in name only if State courts are allowed to decide, as the Louisiana Courts here have decided, that activity by a national bank in a forum prior to suit constitutes a waiver of venue.

2.

Even if the venue provisions of 12 U.S.C. § 94 can be waived by a national bank by activity prior to suit, the further important question remains whether the venue privilege in an action or proceeding seeking a *personal judgment* against a national bank is waived simply by virtue of the bank having instituted an ancillary succession (probate) proceeding in another state and becoming executor therein, but not appointing an agent for service of process in the second state. This question is of great importance to national banks who with great frequency are called upon to act as executors and trustees of estates with property located in other states.

There is a clear conflict on this question between a Court of Appeals case and two state Supreme Court cases. Furthermore, the two state court cases appear to be in conflict with the principles established by this Court in *Olberding* v. *Illinois Central Railroad Co.*, 346 U.S. 338 (1953), and particularly as these principles are applied by lower federal courts in the probate area.

In *Doyle* v. *Loring*, 107 F.2d 337 (6th Cir. 1939), cert. den'd 309 U.S. 686 (1940), suit was brought seeking a personal judgment for mismanagement against a non-resident administratrix who had come into the forum state and filed probate proceedings and secured letters testamentary therein. The Court held that by such conduct the administratrix did not waive her venue privilege. The Court held:

> "The important question is that of venue. The statute, title 28, Sec. 112(a) . . . provides that where the action is between citizens of different States, 'suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' The suit was brought in the Western District of Tennessee and no plaintiff was a resident of that district. According to the averments of the bill, Mrs. Loring [nonresident administratrix] was not a resident of the Western District. *When sued there it was her privilege seasonably to contest the jurisdiction or to waive the question . . . She took the former course* and on May 16, 1938, not intending to submit herself to the jurisdiction of the court, she appeared specially for the sole purpose of questioning the jurisdiction over her person and entered two motions, one as an individual and the other as administratrix, to dismiss the action upon the ground that she was, at the time the suit was brought, a citizen and resident of Texas. Upon the hearing of these motions it was stipulated that at the time the bill was filed she was and 'still is' a resident and citizen of Texas. *Ordinarily this stipulation would terminate the controversy in favor of Mrs. Loring individually and as administratrix, for, upon the question of jurisdiction her citizenship as administratrix was identical with that of her personal citizenship. . . .*"
>
> (The Court then held that a state statute providing for substituted service on an administrator absent from the state did not deprive the administratrix of her federal venue privilege.)

Certiorari was denied by this Court (309 U.S. 686). *Doyle*, thus is a clear holding by the Sixth Circuit that a federal venue privilege is not waived by virtue of a nonresident filing a probate proceeding in the forum state and thereafter acting as administrator of an estate therein.

However, subsequent to the *Doyle* case, and in apparent conflict with it, is *Lichtenfels* v. *North Carolina Nat'l Bank,* 260 N.C. 146, 132 S.E.2d 360 (1963). In *Lichtenfels,* suit was brought against an administrator national bank in a forum where probate was pending but which was in a different county than where the bank was located. The North Carolina Supreme Court held that the bank by filing the probate proceeding in the second county and its administering of the estate in that county had waived its venue privilege. Certiorari was not sought in *Lichtenfels.*

Moreover, the Florida Supreme Court in *County of Okeechobee* v. *Florida Nat'l Bank of Jacksonville,* 112 Fla. 309, 150 So. 124 (1933), had earlier held that a national bank waived venue by entering into a trust agreement requiring of the bank fiduciary duties relating to trust funds located in the county in which suit was brought.

In addition to the clear conflict between the state court cases of *Lichtenfels* and *County of Okeechobee* on the one hand and the Sixth Circuit *Doyle* case on the other hand, the two state court cases are in apparent conflict with the principles established by this Court in *Olberding* v. *Illinois Central Railroad Co.,* 346 U.S. 338 (1963), and cases following *Olberding.*

In *Olberding* this Court resolved a question which had arisen as a result of its decision in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U.S. 165 (1939). In *Neirbo* a Delaware corporation, which had under a state statute appointed an agent for process in New York pursuant to its doing business there, was sued by a nonresident of New York in a federal district court in New York, and this Court held that the venue requirements of the federal venue statute had been waived by virtue of the defendant *having actually designated an agent for process in New York.*

After *Neirbo,* the question arose whether a nonresident defendant who had not *actually designated* an agent for process in a state waived its venue right or privilege on the ground that an agent was automatically appointed for it by operation of law where a state statute so provided.

This question was resolved in *Olberding* v. *Illinois Central Railroad Co.,* (346 U.S. 338), where plaintiff, a nonresident of Kentucky, brought suit in Kentucky against defendant Olberding, also a nonresident of Kentucky, for damages occuring when defendant's truck while on temporary business in Kentucky collided with an overpass of the plaintiff railroad causing a subsequent derailment. The defendant was served with process by serving the Secretary of State of Kentucky according to the Kentucky nonresident motorist statute. The courts below held that the defendant had waived the venue privilege because he had consented to be sued in Kentucky by virtue of his truck being driven on the highways of Kentucky, which state had a statute holding nonresident motorists amenable to service for accidents caused by their negligent operations within the state.

However, this Court held that a waiver had not occurred and that *actual rather than implied consent by virtue of activity* in the state was necessary for a waiver of venue rights. The Court distinguished *Neirbo* on the ground that the actual appointment of an agent for process in *Neirbo* constituted the *actual consent* necessary for waiver.

Lower federal cases decided after *Neirbo* and *Olberding,* but adopting their principles, have held that the filing of probate proceedings in a second state does not constitute a waiver by a nonresident of venue privilege where he has not appointed an agent for process in the second state. *Davis* v. *Smith,* 126 F. Supp. 497 (E.D. Pa. 1954), aff'd 253 F.2d 286 (3rd Cir. 1958); *Leonard* v. *Wharton,* 268 F.

Supp. 715 (D.C. Md. 1967); *Friele* v. *Schaffer*, 177 F. Supp. 654 (D.C. Mont. 1959).

Not only does it appear that the state cases of *Lichtenfels* v. *North Carolina Nat'l Bank*, 132 S.E. 2d 360, and *County of Okeechobee* v. *Florida Nat'l Bank*, 150 So. 124, are in conflict with *Olberding*, 346 U.S. 338, and the cases following it, but this Court in *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, in footnote 13 of its opinion seemingly equated the holding in the *County of Okeechobee* case with the holdings of other state court cases which stated that the venue provisions of 12 U.S.C. § 94 are permissive, rather than mandatory — holdings which were clearly refuted and disapproved in *Langdeau*.

Petitioner submits that the tremendous importance to national banks (who with great frequency are called upon to exercise trustee and executor functions in counties and states outside of their location) in having resolved the conflict between the cases above discussed so that they will clearly know whether they can be subjected to suits seeking to impose personal judgments on them in counties and states outside of their location where they exercise fiduciary functions, is a compelling reason for this Court to grant certiorari.

3.

Whether a proceeding filed in the same style and number as a long-pending Louisiana succession (probate) proceeding, is a "proceeding" within the meaning of 12 U.S.C. § 94 providing that "actions and proceedings" against national banks are to be brought where the banks are located, is one of the first impression. Since the statute uses both the words "actions" and "proceedings" it is obvious that Congress intended each to have a different meaning, but neither this Court nor apparently any other has defined the term "proceedings" as used in the statute. This open

question should now be answered so that guidelines are available to other courts in the future.

This Court in *Bowers* v. *New York & A. Lighterage Co.*, 273 U.S. 346 (1927) did grant writ of certiorari to review the question of whether the word "proceeding" used in § 250(d) of the Revenue Act of 1921, providing that no "suit *or proceeding*" for the collection of any unpaid income or excess profits taxes shall be begun after the expiration of five years after the date a return was filed, had reference only to a judicial proceeding or whether it also barred collection of taxes by distraint, and this Court held that the word had a meaning broader than "suit" and did bar collection by distraint.

Moreover in *Ingravallo* v. *Pool Shipping Co.*, 247 F.Supp. 394 (E.D. N.Y. 1965), it was stated:

> ". . . In Volume 34, Words and Phrases, page 152, the word 'proceedings' is defined as, 'all the *steps* or *measures* adopted in the prosecution or defense of an action. Slatter v. United States [9 Cir.], 66 F.2d 819, 822' . . ."

Furthermore, in *Gonzales* v. *Gonzales*, 240 Mass. 159, 133 N.E. 855 (1921), a statute had been passed providing for a direct appeal from the Massachusetts probate court to the Supreme Judicial Court of Massachusetts in any "proceeding" which was commenced after the date of the enactment. In the cited case, a will had been probated, a number assigned by the probate court and letters testamentary issued to an administrator before the date of the enactment of the statute in question. Thereafter, the administrator filed a petition *in the same pending action giving it the same style and number theretofore assigned and seeking approval of his accounts*. This "proceeding" was one requiring notice and service upon interested parties — just

as the relevant Louisiana statute requires notice and service for the Motion for Rule to Show Cause and the Petition for Notice of Filing Tableau of Distribution filed by the Andrau plaintiffs.

In *Gonzales* the probate court entered an order denying approval of certain items of the account of the administrator. The administrator thereupon sought to appeal to the County Court of Suffolk County, Massachusetts. His attempted appeal was dismissed on the ground that the newly enacted statute required an appeal not to the County Court but to Massachusetts' Supreme Judicial Court. The administrator thereupon appealed the order of dismissal to the Supreme Judicial Court of Massachusetts. Accordingly, that court had before it the exact question presented in this case, viz: Is a new "proceeding" in an old "action" governed by a statute dealing with "proceedings" *commenced after the date of the statute?* The Supreme Judicial Court of Massachusetts held that the petition for approval of the account was a "proceeding" coming under the new statute and, accordingly, dismissed the appeal. In disposing of this question, the Court held:

> ". . . In the consideration of the legislative intent in the use of the word 'proceeding' in St. 1919, c. 274, §§ 1, 10, we set to one side as not being 'any proceeding begun after this act takes effect' *the incidental procedural orders and decrees whenever made, which necessarily must be made in every probate petition which looks to a final decree. As regards substantial proceedings in the probate court under petition and notice to adversary interests after the appointment of an administrator or executor, we are of opinion the Legislature intended the words 'any proceeding' should mean any indpendent steps taken in the settlement of the estate that cannot be taken and determined by the court except upon a petition and hearing thereon, which shall be independent of the petition upon which the original letters of administration issued.*"

The Bank submits that the correct criterion to be used in defining the word "proceedings" is that set forth in the *Gonzales* case, supra, and that set forth in *State* v. *Wright,* 186 Wash. 194, 57 P.2d 323 (1936), in which application for writ of mandamus was made to compel a judge to grant a change of venue on a petition to vacate a decree adverse to relator. Washington had a statute which provided that a change of venue shall occur in "any action or proceeding" wherein the judge is prejudiced. The question for decision in the case was whether a petition to vacate a judgment filed in the same case where the judgment was rendered constituted an "action or proceeding" within the meaning of the statute providing for a change of venue for prejudice.

The Washington Supreme Court held that a proceeding on a petition to vacate a judgment did constitute a "proceeding" within the meaning of the statute, and in support of its holding quoted from the earlier Washington Supreme Court case of *Cooper* v. *Cooper,* 83 Wash. 85, 145 Pac. 66 (1914), in part as follows:

> " 'It will be noted that this proceeding by petition is in its nature a new and independent proceeding in which the adverse party is brought into court as upon original process by service of a notice in the nature of a summons as in an original action. Clearly this proceeding by petition is intended as a statutory substitute for a bill of equity to set aside a judgment for certain causes, if brought within the year after its rendition. For every practical purpose such a proceeding is in its nature a new and independent proceeding involving issues and requiring evidence which may be wholly independent of the issues and evidence in the original action.
>
> • • •

> *"'It seems to us that a proceeding which is instituted with all the formality of an original action and conducted throughout in the same manner as an original action and in which the parties, regardless of their designation in the original action, occupy the relation of plaintiff and defendant according to the issues presented by the petition, and in which those issues may take all the range of an independent bill in equity for relief against a judgment, is in its very nature a new proceeding, and hence falls within the purview of the act of 1911 relating to the disqualification of judges of the superior court, for prejudice.'"*

Based on the criterion set forth in the preceding cases, the proceeding against the Bank in this case insofar as it seeks an *in personam* judgment for failure to deposit money in a Louisiana bank and for failure to file an accounting is certainly a "proceeding" within the meaning of 12 U.S.C. § 94.

Actions against Louisiana executors to invoke penalties for failure to account and to deposit funds are not required to be brought in the succession proceeding at all and may be brought as independent suits. *Congregation of St. Mary of Mt. Carmel Church* v. *Farrelly*, 34 La. Ann. 533 (1882); *Succession of E. H. Dickson* v. *Succession of D. F. Dickson*, 23 La. Ann. 583, (1871). Even when such actions are brought in the succession proceeding, they are in the nature of an independent suit and certainly may involve issues and require evidence wholly independent of the issues and evidence in the succession proceeding. Moreover, such proceedings when brought in the succession are instituted by a Motion for Rule to Show Cause, which under Louisiana law requires an appearance on the part of the defendant and service of the motion upon the defendant before the proceedings can be prosecuted, which service cannot be satisfied by simply *mailing a copy* of the Motion

to defendant's counsel of record in the succession proceeding. LSA-C.C.P., Arts. 1312, 1313, 1314; *Normand Co.* v. *Abraham*, 176 So.2d 178 (La. Ct. App. 1965). Therefore, it would certainly appear that the claims seeking a personal judgment against the Bank are "proceedings" to which the provisions of the 12 U.S.C. § 94 apply.

However, since there are no decisions by this Court interpreting the word "proceedings" contained in 12 U.S.C. § 94, writ of certiorari should be granted to resolve whether the word "proceedings" simply means, despite the presence of the word "actions" in the statute, a new lawsuit, or whether it also includes a new proceeding instituted in a pending suit.

4.

Whether an action or proceeding against a national bank for a personal judgment for many millions of dollars is a "local action" where the suit is not only for damages but also for an accounting and distribution of the estate is also a question which has not previously been presented to this Court.

This question is also of great importance to national banks exercising executor or trustee functions in counties where they are not located. This Court in establishing the "local action" exception to the venue privilege of 12 U.S.C. § 94, in *Casey* v. *Adams*, 102 U.S. 66 (1880), stated as follows:

> "... *Local actions are in the nature of suits in rem*, and are to be prosecuted when the thing on which they are founded is situated.
>
> " • • •
>
> "The proceeding in this case was local in nature. ... *no personal claim was made against the bank.* Nothing was wanted except to 'class the privilege' of

> the bank on the property seized 'according to its rank.'"

However, it has been urged by Respondents in the courts below that since this proceeding involves probate matters, including removal of the Bank as executor and distribution of the estate, it is a local action.

Doyle v. *Loring*, 107 F.2d 337 (6th Cir. 1939), cert. den'd 309 U.S. 686 (1940), while not discussing the local action question, impliedly held that actions against nonresident executors resulting from alleged wrongs in connection with their fiduciary duties are *not* local actions, for that Court enforced the venue privilege and did not allow the prosecution of the suit in the forum state where the fiduciary duties were to be performed.

This Court has held that actions seeking *in personam* liability against an executor or other fiduciary are not local, (in the sense of being the exclusive province of the state probate court) and that such actions may be brought in *federal* court. By necessary implication, such decisions seemingly dispose of the argument in the instant case that the *in personam* claims are local because of their probate connection.

Thus, in *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909), also a case arising in Louisiana, suit was brought in federal court by an heir against, among others, the executor of the estate of a testatrix who died in Louisiana seeking (1) the setting aside of a certain legacy in the testatrix's will, (2) a determination that certain other legatees had renounced and abandoned their interests in the legacy and in the residue of the estate, (3) an award to plaintiff of the legacy sought to be set aside and the residue of the estate, and (4) a decree requiring the executor to account for the estate of the testatrix.

This Court held that a federal court has no jurisdiction over proceedings *purely of a probate character for they were local state matters,* but it also held that a federal court did have jurisdiction to determine and award binding *in personam* decrees. This Court then held that the accounting issue was a purely probate matter and thus not cognizable in a federal court, but that the federal court did have jurisdiction to determine the right of the plaintiff to the attacked legacy and the residue of the estate *and to enter judgment against the defendant executor binding it personally for the amount of the legacy and the residue.*

In the subsequent case of *Commonwealth Trust Co.* v. *Bradford,* 297 U.S. 613 (1935), a national bank receiver who had voluntarily appeared in the Orphans' Court (probate) of Pennsylvania to relinquish control of a trust fund to a successor trustee, thereafter filed suit in a federal district court seeking judgment in that court that the bank would be entitled to share in the trust fund. On motion to dismiss the district court held that the Orphans' Court *did not acquire exclusive jurisdiction of all matters concerning the fund simply because it had jurisdiction of certain matters such as "accounting" and "distribution" thereof.*

Both the Court of Appeals and this Court affirmed. This Court, in relying on the theory set forth in the *Waterman* case, stated:

> ". . . But they (petitioners) maintain the cause stated by the bill was not one cognizable in equity, since the subject matter was a fund held by a trustee under appointment of the State Court against which no adjudication was possible in the absence of an accounting — the necessity of this was inherent in the cause as presented. Also, that to enforce the remedy sought would necessarily interfere with possession and con-

trol of the res in the custody of the Orphans' Court. And further that under the rule of comity . . . the trial court should have dismissed the proceedings.

"• • •

"The trust here involved was created by the Bank's voluntary action, not by the Orphans' Court. *Whatever control the latter possessed resulted solely from appointment of the successor trustee and, for present purposes, did not materially differ from that exercised by probate courts over such fiduciaries as guardians, administrators, executors, etc. The jurisdiction of Federal Courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interest therein. Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution* . . . Waterman v. Canal-Louisiana Bank & T. Co., 215 U.S. 33, 43. . . . Property in its (the trustee's) possession is not in custodia legis as in case of receivers. . . ."

Therefore, the mere fact that certain claims have a probate connection does not make them local actions.

This same position or theory was recognized in *Booth* v. *Merchants Nat'l Bank of Brownsville,* 100 F.2d 478 (5th Cir. 1938), which involved the removal of a case from an appellate state probate court to a federal district court where part of the relief sought was an *in personam* judgment against an executor for mismanagement of the estate. There the Fifth Circuit held that while certain aspects of the case were purely of a local, probate character, the claim against the executor bank for mismanagement was an *in personam* or *inter partes* action which was not of such a local probate character as to preclude jurisdiction over it by a federal court.

Clearly, while courts have held that certain matters such as a request for an accounting are of a purely probate character and thus local actions, they have also held that actions seeking enforcement of *in personam* rights or imposition of *in personam* liability are not of a purely probate character and may therefore be brought in federal court, which does not have jurisdiction over actions of a purely probate character. Consequently, actions or proceedings seeking to impose personal liability should not, because of their probate connection, be considered local actions.

However, even though decisions in other areas readily demonstrate by analogy that such actions are not local, petitioner could not find a decision determining whether *in personam* actions against executors or other fiduciaries are local actions within the *Casey* v. *Adams* exception to the venue provisions of 12 U.S.C. § 94. It is important that such a question now be considered and resolved else national banks could be held subject to suits seeking *in personam* liability in courts outside of the location of the national banks on the ground that by being linked with purely probate matters, such actions are local.

CONCLUSION

The trial court did not set forth its reasons for denying petitioner's declinatory exceptions seeking a change of venue. Moreover, neither the Court of Appeal nor the Supreme Court of Louisiana set forth the reasons for their opinions and judgments that the action of the trial court was correct. Therefore, because of the uncertainty of the grounds for these holdings as well as for all of the other reasons set forth herein, this petition for writ of

certiorari should be granted on all questions presented herein.

Respectfully submitted,

.....
L. Keith Simmer

.....
James C. Slaughter

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October 8, 1968

CERTIFICATE OF SERVICE

In accordance with Rule 33 of the Supreme Court Rules, I hereby certify that copies of the foregoing Petition for Writ of Certiorari were duly served upon Claude R. Miller, Esq., Park Cities National Bank Building, Dallas, Texas, and Charles H. Dameron, Esq., of Durrett, Hardin, Hunter, Dameron & Fritchie, 408 Louisiana National Bank Building, Baton Rouge, Louisiana, attorneys of record for movants in the proceedings on the motion for rule to show cause filed in the Succession of E. W. K. Andrau, No. 3972, Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, by depositing same in the United States Mail, air mail, certified mail, return receipt requested, with required postage prepaid, on the ..... day of October, 1968.

.....

L. Keith Simmer

APPENDIX A

OPINION OF SUPREME COURT OF LOUISIANA

SUPREME COURT OF LOUISIANA

New Orleans, 70112

No. 49,359 July 16, 1968

IN THE MATTER OF THE
SUCCESSION OF E. W. K. ANDRAU

In re: Bank of the Southwest National Association, Houston, applying for writs of certiorari and mandamus

---

Writ refused. The ruling of the trial court is correct.

/s/ MEB

/s/ JBF

/s/ JWS

HAMLIN, J., concurs; but is of the view that applicant's remedy may be by motion to stay the Louisiana proceedings. Cf. Transamerica Ins. Co. et al vs. Whitney National Bank of New Orleans, ... La. ..... 206 So. 2, 500.

APPENDIX B

OPINION OF COURT OF APPEAL FOR THE FIRST CIRCUIT STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT STATE OF LOUISIANA

IN THE MATTER OF THE SUCCESSION OF E. W. K. ANDRAU — No. 7573

In Re: Bank of the Southwest National Association, Houston applying for writs of Certiorari and Mandamus to the Eighteenth Judicial District Court, Parish of Pointe Coupee, Honorable Daniel P. Kimball, Judge, presiding.

Writs refused: The ruling of the trial court is correct.

/s/ H. R. Reid

/s/ Julian E. Bailes

Filed: June 20, 1968
John E. Miller, Clerk

APPENDIX C

OPINION OF EIGHTEENTH JUDICIAL DISTRICT COURT PARISH OF POINTE COUPEE STATE OF LOUISIANA

EIGHTEENTH JUDICIAL DISTRICT COURT PARISH OF POINTE COUPEE STATE OF LOUISIANA

SUCCESSION OF	NUMBER 3972
E. W. K ANDRAU	JUDGMENT OVERRULING DECLINATORY EXCEPTION OF LACK OF JURISDICTION

This matter came up regularly for hearing on the Declinatory Exception of lack of jurisdiction filed on behalf of Bank of the Southwest National Association, Houston. There were present for Exceptor Messrs. L. Keith Simmer, Victor A. Sachse, Sr., J. Thomas Jewell and Harry Sachse and for plaintiffs in rule, Messrs. Claude R. Miller and Charles H. Dameron.

When, after considering the pleadings, the evidence and the arguments and written briefs of counsel, the Court being of the opinion that the law and the evidence are in favor thereof, for the reasons this day orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that the Declinatory Exception of lack of jurisdiction filed herein by Bank of the Southwest National Association, Houston, be, and the same is hereby overruled.

JUDGMENT READ, RENDERED AND SIGNED in Open Court at New Roads, Louisiana, this 27 day of May, 1968.

/s/ DANIEL P. KIMBALL
JUDGE, EIGHTEENTH JUDICIAL
DISTRICT COURT

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No. 629

In the

Supreme Court of the United States

OCTOBER, TERM, 1968

IN THE MATTER OF THE SUCCESSION OF E. W. K. ANDRAU

RESPONDENTS' OPPOSITION BRIEF to PETITION FOR WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF LOUISIANA

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November 4, 1968

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No. 629

In the

Supreme Court of the United States

OCTOBER, TERM, 1968

IN THE MATTER OF THE
SUCCESSION OF
E. W. K. ANDRAU

RESPONDENTS' OPPOSITION BRIEF
to
PETITION FOR WRIT OF CERTIORARI
to the
SUPREME COURT OF THE STATE OF LOUISIANA

Respondents, Mrs. Helene Antoinette Andrau Siegler, William E. Andrau, and Mrs. Barbara Andrau Peck, who are the children and heirs of E. W. K. Andrau, pray that the Petition For Writ of Certiorari be denied.

JURISDICTION

It is respectfully suggested that the Supreme Court of the United States does not have jurisdiction of this cause.

The questions as to whether petitioner has waived its statutory rights and of estoppel are not federal ones, and when the Louisiana Supreme Court applied state law and nonfederal doctrine which forbids parties from assuming inconsistent positions in judicial proceedings, this Court will not take jurisdiction. *Leonard v. Vicksburg*, (1905) 198 U.S. 416.

The petitioner has not met its burden to show affirmatively that this Court has jurisdiction. *Gorman v. Washington University*, (1941) 316 U.S. 98.

The Louisiana Supreme Court delivered no opinion, and its judgment *might* have rested upon nonfederal grounds. *Stembridge v. State of Georgia,* (1952) 343 U.S. 541.

Additional authorities as to this Court's lack of jurisdiction are cited, *infra.*

QUESTIONS PRESENTED

1. As To This Court's Jurisdiction

(1) Will this Court refuse to take jurisdiction where the judgment of the Louisiana Supreme Court rests upon the grounds of waiver, estoppel, state laws, and the Bank's inconsistent positions, all of which are nonfederal questions?

(2) Will this Court refuse to take jurisdiction where the petitioner fails to meet its burden to show affirmatively that this Court has jurisdiction?

(3) Where the Louisiana Supreme Court delivers no opinion and it appears that the judgment *might** have rested upon a nonfederal ground, will this Court refuse to take jurisdiction?

2. As To Louisiana District Court's Jurisdiction

(1) Do an executor's voluntary verified appearances in a probate proceeding constitute waiver which estops that executor from escaping the jurisdiction of that probate court when that court orders the executor, as an officer of that

* Emphasis upon the word "might" is by this Court in *Stembridge v. State of Georgia,* (1952) 343 U.S. 541.

court, to fulfill its duty of accounting and to perform the other duties the statutes of Louisiana impose?

(2) Did the Louisiana Supreme Court correctly apply the Louisiana state law and the general doctrine which forbids parties from assuming inconsistent positions in judicial proceedings?

(3) Is the whole administration of an estate a single proceeding in Louisiana, in which an executor who has undertaken it within the jurisdiction shall be subject to the order of the probate court in the matter until the administration is closed by distribution, and in which the executor who has undertaken it shall be required to account for and distribute all that it receives, by the order of that probate court?

STATEMENT OF THE CASE

After the death of Dr. E. W. K. Andrau in 1951, the Bank qualified as executor in this proceeding in Cause No. 3972 Probate, in the Eighteenth Judicial District Court of Pointe Coupee Parish, Louisiana. * (D.1) **

1. Bank Made Oath It Was And Would Be Present In Louisiana

Upon the oath of its counsel (D. 5), the Bank petitioned the Louisiana District Court to appoint the Bank, an out

* Referred to herein as "Louisiana District Court"

** Respondents use the same record designation as those set out on page 2 of the Petition.

of state bank, as executor in Louisiana, assuring the Court, under oath:

> "That The Second National Bank of Houston*, through its Vice President and Trust Officer, has been present in the State of Louisiana, and will be present therein through its said officer, for the purpose of discharging its duties as Louisiana Executor of said decedent". (D. 4)

In reliance upon the Bank's sworn statement that it had been and would be in Louisiana to discharge its duties as Louisiana executor of the Succession of E. W. K. Andrau, through its designated officer, judgment was entered by the Louisiana District Court on July 10, 1952, that the Bank "is hereby recognized and appointed as Louisiana Executor of the Estate of E. W. K. Andrau * * *" (D. 26).

The Vice President and Trust Officer whom the Bank had designated as its agent and representative in Louisiana, *took oath in Louisiana*** on June 25, 1952, that the Bank "and he, in his aforesaid capacity" would well and truly *perform all of the duties incumbent* upon the Bank *as Louisiana Executor* of the Estate of E. W. K. Andrau." (D. 28).

2. Bank Invoked Jurisdiction Of Louisiana District Court In This Proceeding

As will appear from the list below, the Bank acting upon its own volition, appeared in the Eighteenth Judicial District Court for Pointe Coupee Parish in Louisiana and filed *verified* petitions in which it designated itself as "Louisiana Executor of the Succession of E. W. K. Andrau", Cause No. 3972, on ten occasions from June 10, 1952, to May 5,

* On January 19, 1956, the name of The Second National Bank of Houston was changed to Bank of the Southwest National Association, Houston.

** Emphasis added by us unless otherwise noted.

1966. All are listed below. As is shown in the following listing, on a score of other dates, the Bank acting through its counsel, caused inventories, orders, judgments and rules to be entered or to be issued in this proceeding, and in practically every such instance the Bank is referred to as Louisiana Executor of the Succession.

July 10, 1952 was the date the first *verified* petition was filed by the Bank (D. 1, 5).

On October 3, 1952, the Bank filed Petition for Inventory, (D. 31) *verified* by its counsel (D. 32).

On December 1, 1952, inventories were filed (D. 567).

On December 18, 1958, inventories were filed (D. 571).

Inventories were filed on December 16, 1952, (D. 579).

On February 27, 1953, the Court entered an order for private sale (D. 41).

On June 7, 1953, the Bank acting through George M. Irving, petitioned the Louisiana District Court in a *verified* petition to authorize the Bank as Executor to sell interests in oil, gas and mineral leases located in Louisiana (D. 60).

On March 2, 1953, an inventory was filed (consisting of some 111 pages) of the property in Pointe Coupee Parish, Louisiana, (D. 581 through D. 692) *.

* A cursory look at the properties described in this, and the other three inventories, shows the vast oil and gas properties situated in Louisiana over which the Bank is exercising control as Louisiana Executor. As the record in this case shows, the Bank has never made an accounting for the Louisiana property it holds by order of the Louisiana District Court; the Bank has never been discharged as Louisiana executor; the Bank is *at this time* acting as Louisiana executor, and *at this time* the Bank is still in possession of all of the properties described in the various inventories listed here, except some very minor properties that were sold by the Bank upon its petitions to the Louisiana District Court.

On June 3, 1953, the Bank filed a petition (D. 693).

On August 4, 1953, the Court entered an order (D. 705).

On August 19, 1953, on Motion of Counsel for the Bank, the Louisiana District Court entered an order (D. 708).

On January 5, 1954, the Bank filed a petition to execute instruments, (D. 92). This was *verified* by George M. Irving as "Vice President and Trust Officer of The Second National Bank of Houston, Testamentary Executor of the Estate of E. W. K. Andrau" on December 28, 1953, (D. 96).

On January 6, 1954, counsel for the Bank appeared (D. 159).

On seven occasions, October 1, 1952, December 18, 1952, March 2, 1953, November 28, 1952, June 24, 1952, December 16, 1952, March 25, 1954, (D. 710 through D. 716) Louisiana attorneys as counsel for the Bank wrote letters to the Clerk of the Louisiana District Court enclosing petitions, orders, inventories, and the oath of the Executor, in Cause No. 3972, Succession of E. W. K. Andrau.

On July 30, 1954, the Louisiana District Court entered an order. (D. 163).

On August 2, 1954, George M. Irving, *verified* a Petition. (D. 167).

On August 27, 1954, the Louisiana District Court entered an order granting the relief the Bank sought, (D. 180).

On November 5, 1954, the Louisiana District Court recognized the Bank as "Testamentary Executor of the Succes-

sion of E. W. K. Andrau" and entered an order granting the relief the Bank sought, (D. 182).

On November 5, 1954, a Louisiana attorney, as counsel for the Bank "Executor of the Succession of E. W. K. Andrau" appeared in the Louisiana District Court, (D. 184).

On June 25, 1955, a Louisiana attorney, as counsel for the Bank as Executor, *verified* and filed a petition representing to the Louisiana District Court that the gross value of the property owned by "the decedent *within the State of Louisiana* is the sum of Seven Hundred Sixty-Two Thousand Three Hundred Twenty-four and 32/100 Dollars ($762,324.32)"*, (D. 187). The Bank prayed for a rule there as the respondents seek a rule here. *The Bank thus invoked the jurisdiction of the Louisiana District Court and acknowledged that Court's general jurisdiction to issue rules where Bank was mover.* Here the Bank seeks to evade that jurisdiction when the respondents are movers.

On June 24, 1955, the Louisiana District Court *ordered that a rule issue,* as prayed by the Bank, (D. 193).

On July 8, 1955, the Louisiana District Court ordered that the rule to be issued (upon the Bank's petition, as Executor) be made absolute, (D. 195).

On November 5, 1955, the bank filed a petition, *verified* by its counsel, (D. 199).

On November 5, 1955, the Louisiana District Court ordered that a rule issue, (D. 200).

* This further demonstrates the extensive nature of the Louisiana properties which the Bank is still holding *at this time,* and for which the Bank has never made an accounting to the Court that appointed it as Louisiana executor. By its declinatory exception the Bank seeks to avoid making such an accounting forever.

On August 5, 1955, the Louisiana District Court ordered the rule made absolute (D. 201).

On August 15, 1956, George M. Irving, as Vice President and General Trust Officer, *verified* the Bank's Petition, (D. 212), filed in the Louisiana District Court which states "That your petitioner has been duly appointed, recognized and qualified as the Louisiana Executor of the Estate of E. W. K. Andrau", (D. 206), wherein petitioner prays, (D. 212), "that judgment be rendered herein authorizing and empowering it to execute, *in its capacity as Louisiana Executor*" etc., (D. 206, 212).

On August 21, 1956, the Louisiana District Court entered its Order (D. 214).

On August 21, 1956, Joseph P. Jewell, Clerk of the Louisiana District Court, filed in the Succession of E. W. K. Andrau, Docket No. 3972, notice of application referring to the Bank as "Louisiana Executor of the above estate", (D. 215).

On September 14, 1956, the Louisiana District Court entered judgment, recognizing the Bank "in its capacity as Louisiana Executor of the Estate of E. W. K. Andrau", (D. 230).

On October 15, 1956, George M. Irving, as the "Vice President and General Trust Officer of Bank of the Southwest National Association, Executor of the Succession of E. W. K. Andrau" signed and *verified* a petition, (D. 237), filed by the *Bank in proceeding No. 3972* "appearing and acting herein in its capacity as the duly appointed and qualified Louisiana Executor of the Succession of E. W. K. Andrau", (D. 234).

On December 11, 1956, the Louisiana District Court entered its order, (D. 245).

On December 11, 1956, J. Thos. Jewell, as counsel for the Bank "Louisiana Executor of the Succession of E. W. K. Andrau", questioned J. P. Jewell, Clerk of the Louisiana District Court. (D. 247).

On December 11, 1956, the Louisiana District Court entered judgment, recognizing the Bank "in its capacity as Louisiana Executor of the Estate of E. W. K. Andrau" authorizing ratification of a sale, (D. 250).

On March 12, 1965, the Bank as "Testamentary Executor of this Succession" in this Louisiana District Court filed an unverified petition. (D. 256).

On May 5, 1966, the Bank filed its Petition as "Testamentary Executor of this succession", praying that "in its capacity as Executor of the Succession of E. W. K. Andrau" that it be authorized to execute the proposed ratification agreement, in which the Bank states:

> "A question has arisen concerning the legal authority of Petitioner to act for this succession, without Court approval, in signing the above mentioned Sublease Agreement and Extension Agreement; and Petitioner, in its capacity as executor of this succession, wishes to eliminate any such question by executing a ratification instrument, properly approved and authorized by this Court, on the form attached to this petition as Exhibit 'C'." (D. 261)

In the above quoted petition the Bank recognizes and acknowledges its accountability to the Louisiana District Court, *and reaffirms the jurisdiction of that court on May 5, 1966.* (D. 260)

By appearing directly or indirectly *in Cause No. 3972*, the Succession of E. W. K. Andrau in the 18th Judicial District

Court, on the many dates listed above, the Bank repeatedly and consistently represented to the Court that it was present in Louisiana, was acting as Louisiana executor of the Estate of E. W. K. Andrau, and would discharge all its duties as such executor under the laws of Louisiana, and by its actions, represented to the Louisiana District Court that it had waived any exemption it might have under 12 USC Sec. 94 to question the right of the Louisiana District Court in these proceedings to require the Bank to fulfill its duties under the laws of Louisiana as Louisiana executor. The Bank by the statements under oath of its counsel and of its officer that it "will be present [in Louisiana] *through its said officer* for the purpose of discharging its duties as Louisiana Executor" on July 10, 1952, designated said officer as its agent for service in Louisiana. (D. 1, 5).

3. Order Of Louisiana District Court Which Bank Seeks To Escape By Plea To Jurisdiction, Is An Order By A Court To An Executor Who Is An Officer Of That Court

The petitioner speaks of the present controversy as though it were a separate action, brought by the respondents, as plaintiffs, against the Bank, as defendant. That is not the situation here. While the respondents are movers, the motion (S. 14) prays that a rule nisi issue directing the Bank to show cause why it should not fulfill the eleven enumerated duties that an executor is legally obligated under the laws of Louisiana to perform, (S. 19). While movers will receive some benefits if the Bank as executor is compelled to perform its legal duties, *the Louisiana District Court could have issued this order on its own motion** to require the executor as an officer of the Eighteenth Judicial District

* Former Article 1674, Louisiana Revised Civil Code, and Article 3331 Louisiana Code of Civil Procedure.

Court to file a final account, fulfill other duties of an executor, and show cause why the administration of the Louisiana Succession should not be promptly terminated.

The Bank, by filing its declinatory exception, is contending that the Louisiana District Court has no right to require the Bank as executor appointed by that Court to make an accounting or to perform any other act that the Louisiana District Court can require an executor appointed by it to do. The Bank takes this position despite its having qualified as executor, taken the executor's oath, and invoked the jurisdiction of the court as "Louisiana executor" on many occasions, as set out *supra*.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court Does Not Have Jurisdiction

(1) *Waiver, Estoppel And Inconsistent Positions Are* Not *Federal Questions*

The only questions the Louisiana Supreme Court could logically have based its judgment upon are: the waiver by the Bank of its exemption under 12 USC Section 94, the Bank's being estopped to deny such waiver, the application of Louisiana laws in determining the jurisdiction of Louisiana courts, and the Bank's attempting to take inconsistent positions in the same proceedings. *All of these are nonfederal questions.* This court has consistently refused to take jurisdiction to consider such nonfederal questions. In *Leonard v. Vicksburg*, (1905) 198 U.S. 416, cited *supra*, this Court held:

> "'A person may, by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action is not a Federal one.'

> "In the present case, the supreme court of Louisiana applied the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings."

Leonard is adequate precedent to answer all the questions here adversely to the Bank's petition, and to warrant the denial of the petition for certiorari.

In *Eustis v. Bolles*, (1893) 150 U.S. 361, this Court held that it must appear affirmatively that the decision of the federal question was necessary to the determination of the cause.

In *Gillis v. Stinchfield*, (1895) 159 U.S. 658, 660, *estoppel* was held to be *nonfederal* grounds.

There are many other decisions by this Court which follow the same principles enunciated in *Leonard*, *Eustis*, and *Gillis*. No decisions by this Court have been found which appear to hold contrary views to those expressed in these three cases.

It is the law of Louisiana that parties cannot make an assertion in court for their own benefit, and then be heard to say that their assertion was false. The Louisiana Court of Appeal so decided in *Abbot v. Wilbur**, (1870) 22 La. App. 368. Such decision is a nonfederal ground. This Court has held that *estoppel* arising because of the contradictory statements made by one of the defendants at a different time and place involves no Federal question. *Beals v. Cone*, (1903) 118 U.S. 184.

(2) *Petitioner Has Failed To Meet Its Burden*

The burden is upon the Bank as petitioner to show affirmatively that this Court has jurisdiction. The Bank has not

* *Abbot* was quoted and approved as "directly in point" by this Court in *Davis v. Wakelee*, (1894) 156 U.S. 680. Quotations from both decisions will be found, *infra*.

made such a showing. This Court held in *Gorman v. Washington University* (1941) 316 U.S. 98, 101:

> "Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction."

The Bank cannot affirmatively show the Louisiana Supreme Court's judgment was upon federal grounds since it is obvious that the Louisiana Supreme Court must have rested its judgment upon nonfederal grounds. While the Louisiana Supreme Court wrote no opinion, the questions before it were the nonfederal questions as to waiver, estoppel, Louisiana state law, and the Bank's attempt to take inconsistent positions. There was no dispute between the Bank and the respondents as to the existence of 12 USC Section 94, nor as to the petitioner being a national bank. The law seems well settled that a bank can waive its immunity under 12 USC Section 94. The Bank here so recognizes that waiver is possible on page 7 of its Petition. The case which the Bank relies upon most, *Mercantile National Bank v. Langdeau*, (1963) 371 U.S. 555, also recognizes the fact that a bank may waive its immunity under 12 USC Section 94, by citing as "notable" the decision in *First National Bank of Charlotte*, (1889) 132 U.S. 141, (quoted, *infra.*)

The Bank has not met its burden *to show affirmatively that a federal question was present and its decision was necessary to the determination of the cause. Supreme Court Rule 23 1. (f); Johnson v. Risk* (1890) 137 U.S. 300; *Waters Pierce Oil Co. v. State of Texas* (1908) 212 U.S. 86; *Williams v. Oliver* (1851) 53 U.S. 111.

In *Bachtel v. Wilson*, (1906) 204 U.S. 36, no opinion was filed by the state Supreme Court, and this Court, with reference to the judgment, held at page 40:

> "The supreme court of a state is the ultimate tribunal to determine the meaning of its local statutes."

Mr. Justice Black, speaking for this Court, held in *Kersh Lake Drainage District of Jefferson v. Johnson* (1940) 309 U.S. 485, that a *determination by the states highest court is binding upon this court* as to the jurisdiction of the state Chancery Court under the State law.

This Court, in *Bilby v. Stewart*, (1918) 246 U.S. 255, after finding that a federal question *did* exist, held:

> "since the supreme court rested its judgment upon a non-Federal ground adequate to support it, the existence of a Federal question is of no significance."

This Court held in *Buck v. People of the State of California*, (1952) 343 U.S. 99, 103:

> "[I]f it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Citing numerous cases)

Mr. Justice Brennan held, in *Henry v. State of Mississippi*, (1965) 379 U.S. 443, 446:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions."

Mr. Justice White held, in *Jankovich v. Indiana Toll Road Commission*, (1965) 379 U.S. 487, 482:

> "Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold."

To the same effect are: *Consolidated Turnpike Company v. Norfolk*, (1913) 228 U.S. 596; *McGoldrick v. Gulf Oil*, (1939) 309 U.S. 2-3; *Lynch v. People of the State of New York*, (1934) 293 U.S. 52.

Here the Bank, as petitioner, has wholly failed to meet its burden. The Bank appears to have assumed that this Court will take jurisdiction, despite the obvious fact that the judgment of the Louisiana Supreme Court must have rested upon nonfederal grounds.

(3) *Where Judgment* Might *Have Rested On Nonfederal Grounds This Court Will Not Take Jurisdiction*

This Court went further in *Stembridge v. State of Georgia*, (1952), 343 U.S. 541, and held:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." (citing many cases) (emphasis by the Court)

(4) *The Logical Basis For Louisiana Supreme Court's Judgment Rests Upon Nonfederal Grounds*

The Louisiana Supreme Court did not write an opinion. It held that "the Judgment of the trial court is correct" (A). The Louisiana Supreme Court had before it the Briefs filed by respondents (S. 37, 66) wherein the nonfederal questions of waiver, estoppel, state law, and the prohibition against a party taking inconsistent positions are discussed. (S. 37, 66). These were questions before that Court.

The respondents relied (S. 66) upon the Louisiana Court of Appeal's holding in *Gravet v. Gonsoulin*, (1929) 120 So. 643. That decision pronounced the state law of Louisiana to be:

> "It seems to us that it would be unconscionable to permit plaintiff who filed the present suit in 1928, after such a long period of inaction, to attack as null and void the acts performed by her agent in her behalf and

> for her benefit. It makes no difference whether Adrien Gonsoulin's authority was vested in him by law or by the consent of the plaintiff. She is equally bound in either event, and is now estopped from questioning that authority. * * *

Respondents called the Louisiana Supreme Court's attention to the holding *In re Estate of Schutte*, (1965) 134 N.W. 2d 600, where the Nebraska Supreme Court held, at page 605, 606:

> "Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves. * * *
>
> Also, it has been held: 'A litigant who has invoked the jurisdiction of the court upon a matter of which it has power to take cognizance cannot thereafter object thereto'. In re Estate of Nilson, 126 Neb. 541, 253 N.W. 675."

Respondents cited and quoted (S. 72) to the Louisiana Supreme Court the decision of *Kirby v. Kirby*, (1936) 55 P. 2d 356, where the supreme court of Kansas held *that courts will not tolerate the attempt of persons to invoke the jurisdiction of a court then seek to repudiate the action of the court upon the ground that the court is without jurisdiction.*

Respondents also cited and quoted to the Louisiana Supreme Court other decisions which forbid the taking of an inconsistent position in judicial proceedings. There are:

> *In re Cartmell's Estate*, (1958) 138 A 2d 592; *Lord v. Hubert*, (1957) 145 N.E. 2d 77; *Delco Ice Mfg. Co. v. Frick Co., Inc.* (1935), 178 A. 135; and *In re Barnes Estate*, (1931) 235 N.W. 701. (S. 71-73)

It is logical to assume that the Louisiana Supreme Court based its judgment upon nonfederal grounds. If that is not conceded, then it seems inescapable that the judgment *might** have been upon nonfederal grounds. *Stembridge v. State of Georgia,* (1952) 343 U.S. 541.

If this Court finds that it does not have jurisdiction, of course there is no need to consider the following portion of this brief, which concerns the jurisdiction of the Louisiana District Court.

2. The Louisiana District Court Has Jurisdiction

(1) *Having Voluntarily Invoked The Probate Court's Jurisdiction, An Executor Cannot Repudiate That Jurisdiction*

In an early case, this Court considered the effect of one voluntarily making himself party to proceedings *in Louisiana,* in *Clay v. Smith,* (1830) 28 U.S. 3, Pet. 411 [7:723], and held that immunity could be, and was, abandoned.

Applying the doctrine to a national bank that sought to change its position after having submitted to the jurisdiction, this Court held in *First National Bank of Charlotte v. Morgan* (1889) 132 U.S. 141, 145:

> " * * * Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of the opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive * * * And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is

* Emphasis that of the Court.

> located is a personal privilege, which it could claim or not, as it deemed necessary."

This Court held in *Ex Parte Schollenberger*, (1877) 96 U.S. 369, 378:

> "* * * If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases * * *"

The opinion in *Central Trust Co. v. McGeorge*, (1893) 151 U.S. 129 cites, quotes from, and follows *First National v. Morgan, and Schollenberger.*

The Fifth Circuit arrived at the same conclusion in *Hoxsey v. Hoffpauir*, (1950) (certiorari denied 70 S. Ct. 841) 180 F. 2d 84.

The Eighth Circuit took cognizance that *no federal question is presented* in a determination of the jurisdiction of a probate court, in *Redditt v. Hale*, (1950) 184 F. 2d 443, and (1952) 199 F. 2d 386.

In a number of cases courts have held that executors, administrators, or corporations could not voluntarily invoke a court's jurisdiction and subsequently escape that jurisdiction. *Friele v. Schaffer*, (1959) 177 F. Supp. 654; In re *Cartmell's Estate*, (1958) 138 A. 2d 592; *Bryan v. Miller*, 16 N.W. 2d 275; *Delco v. Frick*, (1935) 178 A. 135; *Ellis v. Starr*, 49 S.W. 2d 1078; In re *Barnes Estate*, 235 N.W. 701, 135 A. 219; *Martel v. Block*, (La. Supreme Court 1923) 98 So. 400.

(2) *Bank Has Waived Its Exemption Under 12 USC Section 94 And Is Estopped To Deny The Jurisdiction Of The Louisiana District Court*

In *Ohio and Mississippi Ry. Co. v. McCarthy*, (1887) 96 U.S. 258, this Court stated that a party can not "mend his

hold", that "He is estopped from doing it by a settled principle of law."

The Louisiana Court of Appeal, in *Abbot v. Wilbur*, (1870) 22 La. App. 368, 371, stated the law of Louisiana as to estoppel to be:

> "* * * A party who has acquiesced in a judgment, can not sue to annul it, no matter how radical its defects, or absolute its nullity * * *.
>
> "* * * they can not be heard now to say that their assertion was false."

This Court cites *Abbot v. Wilbur, supra*, saying it is "directly in point", quotes the same sentence we have quoted above from *Ohio and Mississippi Ry. Co.*, and holds, in *Davis v. Wakelee*, (1894) 156 U.S. 680, 689, 690:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be the prejudice of the party who has acquiesced in the position formerly taken by him.

In one such case, striking down an "about face", the Arizona Supreme Court held in *Martin v. Wood*, (1951) 229 P. 2d 710, 712:

> "* * * in the lower court, in the instant case appellant proceeded to do an 'about face' * * * Appellant will not be allowed to take such a contrary position to the prejudice of appellee."

Other judicial holdings that agree with the opinions cited under this subhead of this brief are: *Leonard v. Wharton*, (1967) 268 F. Supp. 715, *Mahlum v. Carlson*, (Ninth Circuit 1962) 304 F. 2d 285, *Admiral Theatre Corp. v. Paramount*,

(1955) 140 F. Supp. 686, *Lord v. Hubert*, (1957) 12 Ill. 2d 83, 145 N.E. 2d 77, *Harlan v. Harlan*, 161 P. 2d 490, *Hargrave v. Turner*, (1940) 193 So. 648.

The South Dakota Supreme Court "condemned" the "anomalous situation" of an executor who made a representation to a probate court, and in a subsequent suit, contended to the contrary, as being conduct "playing fast and loose with the court", in *Behrens v. Baldenecker*, (1956) 77 N.W. 2d 917, 919.

Here, the same "anomalous situation" is found which *Behrens* "condemns". The Bank here is taking diametrically opposed positions *in the same proceedings.*

3. Reply To The Bank's Contentions

(1) *Bank Assumed Duties Under Louisiana Statutes Which It Is Legally Bound To Fulfill*

In their "Pre-Trial Memorandum in Opposition to the Declinatory Exception" (S. 37), respondents cited twenty-one Louisiana statutes which govern the rights, privileges, duties and responsibilities of the Bank as Executor.

In the interest of brevity, the statutes granting *rights and privileges* to the Bank (S. 40) will only be cited here. They are Louisiana Code of Civil Procedure Articles 3191, 3196, 3198, 3211, 3223, 3224, 3226, 3228, 3229, 3351 and 3261. All are briefly described in the Memorandum (S. 40).

By voluntarily appearing and qualifying and continuing to act as Louisiana Executor, the Bank assumed at least the following *obligations and responsibilities*:

1. It assumed the duty of collecting, preserving and managing the property of the succession in accordance with law. It had the further obligation to act at all

times as a prudent administrator subject to personal responsibility for all damages resulting from failure to so act. *Article 3191, Louisiana Code of Civil Procedure.*

2. It assumed the duty of closing the succession as soon as advisable. *Article 3197, Louisiana Code of Civil Procedure.*

3. It assumed the duty of enforcing all obligations in favor of the succession. *Article 3211, Louisiana Code of Civil Procedure.*

4. It assumed the duty of preserving, repairing, maintaining and protecting the property of the succession. *Article 3221, Louisiana Code of Civil Procedure.*

5. It assumed the duty of depositing all monies collected by it as soon as received, in a bank account in its official capacity, in a State or National Bank in Louisiana with the further obligation not to withdraw the deposits, or any part thereof, except in accordance with law. Former *Article 1150, Revised Civil Code* and *Article 3222, Louisiana Code of Civil Procedure.*

6. It assumed the obligation, if it was to the best interest of the succession, and subject to the primary duty to preserve the estate for prompt distribution, of investing the succession funds and making them productive. *Article 3223, Louisiana Code of Civil Procedure.*

7. It assumed the obligation of paying the debts and charges of the succession but only with authorization of the Court. *Article 3301, Louisiana Code of Civil Procedure,* and *Articles 1180, 1181* and *1184 of the Revised Civil Code.*

8. It assumed the obligation of filing a tableau of distribution in accordance with law. *Article 3303, Louisiana Code of Civil Procedure.*

9. It assumed the obligation of filing an account annually and at any other time *when ordered by the*

Court on its own Motion or on the application of any interested person. Former *Article* 1674, *Revised Civil Code and Article 3331, Louisiana Code of Civil Procedure.*

10. It assumed the obligation, at the appropriate time, of filing a final account in accordance with *Article 3332 of the Louisiana Code of Civil Procedure.*

The Louisiana District Court issued its rule nisi, as sought by the movers (S. 19), ordering the Bank to fulfill its duties under Louisiana Code of Civil Procedure Articles 3222, 3223, 3301, 3303, 3331, 3332; under Louisiana Revised Civil Code Articles 1180, 1181, 1184, and other statutes. This is an order by a Louisiana probate court to an executor, as an officer of that court, to obey those laws of Louisiana which require an executor to file a current account, file a Tableau of Distribution, file a final account, terminate the Louisiana Succession, make payments, and perform other acts required by the laws of Louisiana. The Bank's response is a plea to the jurisdiction, wherein the Bank is asserting that, despite the many voluntary appearances it has made in this Probate Cause No. 3972 in the Louisiana District Court (as listed *supra* under "Statement of the Case"), that it can deprive this Louisiana District Court of jurisdiction.

It is the law of Louisiana that it would be unconscionable to permit one to take a position such as the Bank is taking here, and that one who attempts to do so is estopped. *Gravet v. Gonsoulin,* (1929) 120 So. 643, cited *Supra.*

(2) *In Louisiana An Administration Of An Estate Is A Single Proceeding Until Completed*

That the present Order is a part of the same "proceeding" as that voluntarily instituted by the Bank seems to be settled by the provisions of the Louisiana Revised Civil

Code, cited *supra*, and by the decisions of the Louisiana courts and the decisions of this Court, cited *infra*.

In an early decision the Louisiana Court held "no doubt was entertained as to the jurisdiction of the probate court" to carry into effect its own orders as to parties who had invoked the jurisdiction of the probate court. *Narcisse Landry v. Connely*, (1843) 4 Robinson's Reports 127. Later, (1929), in *Gravet v. Gonsoulin*, 120 So. 643, the Louisiana Court of Appeal held; 645:

> "It is also true that Adrien Gonsoulin administered said property * * * he was compelled to open the succession; that he first opened it in 1906, filed additional *proceedings* in 1917, and finally terminated his administration in 1922 or 1923. During all of these years plaintiff resided within the parish of Iberia. The *proceedings* commenced by her agent, Adrien Gonsoulin, were conducted openly, necessary legal notices appeared in the official paper of the parish of Iberia * * *"

The Court then went on to hold in the *Gravet* decision that it would be unconscionable to permit the plaintiff to attack the acts of her agent; that the want of jurisdiction may be waived; that the plaintiff had waived the jurisdiction. This portion of the opinion is quoted, *supra*. The Court in *Gravet* holds that in a probate "proceeding" in Louisiana when one has submitted to the jurisdiction of a probate court in Louisiana, he has *waived his rights to question that jurisdiction* in the future, and is *estopped from questioning that jurisdiction*.

This Court held, in *Vaughan v. Northup*, (1841) 40 U.S. 1, 5:

> "On the other hand, the administrator is exclusively bound to account for all the assets which he receives

> under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of *other States have no right to interfere* with or to control the application of those assets, according to the lex loci."

This Court held, in *Reynolds v. Stockton* (1890) 140 U.S. 254, 272:

> "Where a receiver or administrator or other custodian of an estate is appointed by the courts of one State, *the courts of that State reserve to themselves full and exclusive jurisdiction* over the assets of the estate within the limits of the State."

In an opinion by Mr. Justice Holmes, this Court held, in *Michigan Trust Co. v. Ferry,* (1912) 228 U.S. 346, 353:

> "* * * if a judicial *proceeding* is begun with jurisdiction over the person of the party concerned, *it is within the power of a state to bind him by every subsequent order in the cause* * * * This is true not only of ordinary actions, but of *proceedings* like the present. *It is within the power of a state to make the whole administration of the estate a single proceeding,* to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that *he shall be required to account for and distribute* all that he receives, *by the order of the probate court.*"

The Bank does not cite *Vaughan, Reynolds,* nor *Michigan Trust Co.,* in the Bank's petition, yet it would appear that these three opinions cover all the points at issue as to the Louisiana District Court's jurisdiction over the Bank.

The opinion of Mr. Justice Holmes in *Michigan Trust Company* is a complete answer to all the Bank's contentions as to the February 28, 1968 Order (D. 726) not

having issued in the same proceeding. In the light of the Louisiana cases respondents have cited, and this Court's holdings in *Vaughan*, *Reynolds* and *Michigan Trust Co.*, it is submitted that the Bank's position is not in accord with these decisions.

(3) *"No Man Can Take Advantage Of His Own Wrong"**

The Bank admits, on page 7 of its petition, that *Lichtenfels v. North Carolina National Bank* (North Carolina Supreme Court 1963) 132 S.E. 2d 360, holds that "a national bank's pre-suit conduct may constitute a waiver". The Bank places reliance upon *Mercantile National Bank v. Langdeau*, (1963) 371 U.S. 555, but *the questions of waiver, estoppel, state law or inconsistent positions* were not raised in that case. Even though the waiver question had no part in the controversy there being adjudicated, this Court carefully noted in *Mercantile National Bank v. Langdeau* that a bank *could waive its immunity*, by citing as "notable" the decision of *First National Bank of Charlotte v. Morgan*, (1889) 132 U.S. 141, which holds, as quoted *supra*, that the exemption of a national bank is a personal privilege which can be waived.

The Bank relies upon *Buffum v. Chase National Bank* (1951) 192 F. 2d 58, but that decision *also holds*, with reference to 12 USC Section 94, that (p. 60):

> "It is a personal right and, obviously, may be waived by the conduct of the one to whom it belongs."

The Bank cites numerous cases where 12 USC Section 94 is *not* involved. All of the cases the Bank cites, and the respondents have found, which consider 12 USC Sec. 94, seem in agreement that: *a bank can waive its* exemption

* Daniels v. Tearney, (1880) 102 U.S. 415, 422.

under 12 USC Section 94. Since the facts are distinguishable in the cases cited by the Bank from the facts here, the question presented here, *if* this Court has jurisdiction, is: upon the facts in *this* case, did *this* Bank waive its exemption under 12 USC Section 94?

The *Lichtenfels* opinion is the *only authority* which the petitioner cites, or the respondents have found, *where the facts are almost identical with those in this controversy.*

In *Lichtenfels*, the court had this Court's decision in *Mercantile National Bank v. Langdeau* before it, and cites that opinion, along with *Michigan National Bank v. Robertson*, 372 U.S. 591 and *First National Bank of Charlotte v. Morgan*, as holding that congress has merely accorded national banks a privilege, which "may be waived by conduct prior to the institution of the action."

In *Lichtenfels*, the court cites, quotes, and relies upon the statement by Mr. Justice Holmes in *Michigan Trust Co. v. Ferry*, 228 U.S. 346, as to *the administration of an estate being a single proceeding.* The holding in *Lichtenfels* is so *perfectly in point* that the entire opinion could be quoted here, but only these excerpts are reproduced here:

> *"The proper venue for actions against executors and administrators is the county in which they qualify.*
>
> * * * * *
>
> "Defendant relies on sec 94, Title 12 (Banks and Banking), of the United States Code. * * * The statute does not limit the jurisdiction of state courts. Congress has merely accorded national banks the privilege of having controversies to which they are parties determined in the county of their residence. Mercantile National Bank v. Langdeau, 371 U.S. 555, 83 S. Ct. 520, L. ed. 2d 523. This privilege, granted for the

convenience of national banks can be waived. Michigan Nat. Bank v. Robertson, 372 U.S. 591, 83 S. Ct. 914, 9 L. ed. 2d 961; Mercantile National Bank v. Langdreau, supra; First National Bank of Charlotte, North Carolina v. Morgan, 132 U.S. 141, 10 S. Ct. 37, 39, 33 L. ed. 282.

"The right of a defendant to challenge the venue selected by plaintiff *may be waived by conduct prior to the institution of the action.*

* * * * *

"Neither defendant nor Security National were under compulsion to handle the trust estate created by Mrs. Long's will. Undoubtedly they sought and accepted the grant of authority conferred on them by the Superior Court of Buncombe County for pecuniary reasons.

"Defendant's asserted right to remove requires an answer to this question: Can defendant deprive the Superior Court of Buncombe County of its right and nullify its duty to inquire into the accuracy of defendant's final account merely because it best suits defendant's convenience for the inquiry to be made in Mecklenburg, where it has its principal office, rather than in Buncombe, where it qualified and the law requires it to account? Manifestly the answer must be and is no."

The Bank makes only casual reference to its "pre-suit conduct" in the Louisiana District Court, but as is set out in the respondents' *Statement, supra,* on at least eleven occasions between June 10, 1952, and May 5, 1966, the Bank was a petitioner in the Louisiana District Court.

To such extent that the Bank has received executor's fees, this Bank here, as the Security National Bank did in *Lichtenfels,* "undoubtedly sought and accepted the grant of authority conferred upon [it] — for pecuniary reasons".

The property which the Bank holds in the Succession of E. W. K. Andrau in Louisiana is actually the property of the Louisiana District Court, which that court holds for the benefit of the heirs who are the respondents here. The Bank, an officer of that court by appointment, is here refusing to make an accounting of the Louisiana Court's property to the Louisiana Court. The Bank is saying that a court in Houston, Texas, should decide upon the Bank's acts and omissions as an executor of a Louisiana court in possession of Louisiana property; that the Louisiana District Court which appointed the Bank as executor has no power to order its executor to make an accounting as to the extensive Louisiana property which the executor holds.

In *Byers v. McAuley* (1892) 149 U.S. 608, 613, 615, this Court decided:

> "No officer appointed by any court should be placed under the stress which rested upon this administrator and compelled for his own protection to seek orders from two courts in respect to the administration of the same estate. * * *
>
> "An administrator appointed by a state court is an officer of that court; *his possession* of the decedent's property is a possession taken in obedience to the orders of that court; it *is the possession of the court*, and it is a possession which *cannot be disturbed by any others court*. Upon this proposition we have direct decisions of this court. * * *
>
> "There is nothing in any decision of this court, controverting the proposition thus stated, that the administrator is the officer of the state court appointing him, and that property placed in his possession by order of that court *is in the custody of the court*."

Upon the doctrine in *Byers*, the Bank's petition should be denied.

It was stated in *Daniels v. Tearney*, (1880) 102 U.S. 415, at page 421, 422:

> "* * * for the general rule is, that no man can take advantage of his own wrong.
>
> * * * * *
>
> "The parties are estopped from availing themselves of such a defense."
>
> "Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice."

This Court has held in *The Philadelphia, W. & B. Railroad Co. v. Howard*, (1851) 54 U.S. 305, at page 336, 337:

> "This brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, fraud in law, if he does not know it to be true.
>
> * * * * *
>
> "We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was false. * * *"

A corporation is estopped to say that it has not done what it should have done, according to this Court's holding in *Old Wayne Mutual Life Association v. McDonough*, (1907) 204 U.S. 8.

If the Bank can sustain the position it has taken in its petition, it will be permitted to take advantage of its own wrong. As this Court said in *Daniels*, quoted above, to permit the Bank to defeat the jurisdiction of the Louisiana District Court would be "a violation of the plainest principles of reason and justice".

CONCLUSION

The respondents respectfully submit that the Bank has failed to meet its burden to affirmatively show that this Court has jurisdiction.

The respondents further respectfully submit, if need be, that the Louisiana District Court does have jurisdiction to issue the order it issued to its executor, since the property held by the executor is the property of the court, and the administration of an estate in Louisiana is a single proceeding. By having made numerous voluntary appearances in the Louisiana District Court, the Bank waived its exemption under 12 USC Section 94, and is now estopped to repudiate the jurisdiction of a court in which, *in this same proceeding*, it made oath that it, as Louisiana executor, would fulfill all its duties.

The Bank's petition for a Writ of Certiorari should be denied, and the respondents so pray.

Respectfully Submitted,

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November 4, 1968

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Respondents' Opposition Brief To Petition For A Writ of Certiorari to the Supreme Court of Louisiana were duly served upon L. Keith Simmer, Esq. and James C. Slaughter, Esq., of Fulbright, Crooker, Freeman, Bates & Jaworski, 8th Floor, Bank of the Southwest Building, Houston, Texas 77002; Victor A. Sachse, Esq., 701 Fidelity National Bank Bldg., Baton Rouge, Louisiana 70801; and J. Thomas Jewell, Esq., New Roads, Louisiana, attorneys of record for the exceptor in the proceedings on the motion for rule to show cause filed in the Succession of E. W. K. Andrau, Probate No. 3972, Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana. This service was by depositing said copies so addressed in the United States Mail, Air Mail, Certified Mail, Return Receipt Requested, with the full postage prepaid on the 2nd day of November, 1968. As Rule 33 provides, all parties required to be served have been served.

Claude R. Miller

Attorney for Respondents